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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3053

GLEN ALLEN CHAPMAN, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

DAVIS, *Chief Judge*: U.S. Army veteran Glen Allen Chapman appeals through counsel from a June 22, 2015, Board of Veterans' Appeals (Board) decision that denied presumptive service connection under 38 U.S.C. § 1117 for a lung condition diagnosed as sarcoidosis.¹ For the following reasons, the Court will set aside the Board's June 2015 decision and remand for further proceedings consistent with this decision.

I. ANALYSIS

Mr. Chapman asserts that his lung condition, which VA diagnosed as sarcoidosis, qualifies for presumptive service connection under 38 C.F.R. § 3.317 (2016), and that the Board erred in finding otherwise. He argues that the Court should reverse and grant service connection. In the alternative, he asserts that the Board's statement of reasons or bases is inadequate, and that the Court should remand the case for readjudication.

¹ Sarcoidosis is "a chronic, progressive systematic granulomatous reticulosis of unknown etiology, characterized by hard tubercles[]." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1668 (32d ed. 2012).

The Board is required to support its determinations of fact and law with a written statement of the reasons or bases that is understandable by the claimant and facilitates review by this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record," *Schafrath v. Derwinski*, 1 Vet.App. 589, 592 (1991).

Service connection can be established directly or through a statutory presumption. *See Gutierrez v. Principi*, 19 Vet.App. 1, 6 (2004). As the Board acknowledged, the presumption at issue here provides for service connection for Persian Gulf War veterans having a "qualifying chronic disability" that manifested during active service or to a degree of at least 10% prior to December 31, 2016. *See* Record (R.) at 8; 38 C.F.R. § 3.317(a)(1)(i) (2016). Such a "qualifying chronic disability" may be *either* an undiagnosed illness or a "medically unexplained chronic multisymptom illness." 38 C.F.R. § 3.317(a)(2)(i)(A), (B). Service connection will not be granted if there is "affirmative evidence" that the condition was not incurred during military service, is caused by a supervening condition, or is the result of the veteran's willful misconduct. 38 C.F.R. § 3.317(a)(2)(7).

Mr. Chapman argues first that the Board erred in its implied finding that he did not have an undiagnosed illness. He asserts that the 2015 VA examiner, on whose report the Board principally relied, did not make an independent diagnosis of sarcoidosis, but instead relied on previous medical reports that did not, in fact, render such a diagnosis. *See* R. at 93 (June 2007 VA medical report summarizing computed tomography (CT) scan of lungs and indicating bronchoscopy was taken without rendering diagnosis), 86 (June 2009 report of followup CT scan indicating bronchoscopy was nondiagnostic). *But see* R. at 90 (August 2008 VA medical report noting changes in lungs and stating that "[t]hese changes are highly suggestive of sarcoidosis").

The Court's review of the 2015 VA examiner's report, however, does not support Mr. Chapman's assessment. The report indicates that the examiner obtained her own CT scan and included an extensive discussion of the results. *See* R. at 86. In addition to the symptoms described

in the medical history, she further listed "chronic hilar adenopathy, pulmonary involvement," and the results of the 2015 CT scan as supporting a diagnosis of sarcoidosis. *Id.* Thus, while the examiner reviewed all the medical reports, as she was obligated to do, the Court is persuaded that the examiner made her own diagnosis of sarcoidosis. This diagnosis raises the question whether sarcoidosis is a "known clinical diagnosis" that would constitute a bar to the application of the presumption under section (a)(1)(ii).

The structure of section 3.317 clearly indicates that this diagnosis, without more, is not such a bar. The regulation further provides that a "*medically unexplained chronic multisymptom illness* means a **diagnosed illness** without conclusive pathophysiology or etiology" 38 C.F.R. § 3.317(a)(2)(ii) (bold emphasis added; italics in original). This section of the regulation would be rendered superfluous if application of the presumption was barred every time a medical label could be attached to a disorder. *See Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016) ("We read the words of a regulation in their context and with a view to their place in the overall regulatory scheme."); *Roper v. Nicholson*, 20 Vet.App. 173, 178 (2006) (VA statutory and regulatory scheme "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous or insignificant"). Thus, diagnosed medical conditions remain eligible for service connection under the presumption if, among other things, they are characterized by inconclusive pathophysiology or etiology.

The regulatory history of the presumption, specifically the Secretary's remarks pertaining to a 2010 amendment to the regulation, confirms this assessment. *See* 75 Fed. Reg. 61,995-01 (Oct. 7, 2010). Earlier versions of the rule stated that chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome were within this class of known medical conditions that remained eligible for the presumption. In 2010 the Secretary noted: "This change will have the effect of delegating to VA adjudicators the authority to determine on a case-by-case basis whether additional diseases meet the criteria of paragraph (a)(2)(ii) in the same manner as they make other determinations necessary in deciding claims" *Id.* at 61,995-96.

The Board's discussion reads, in relevant part:

Crucially, the [2015] examiner found that the Veteran's chest x-ray could have become abnormal only as early as in 2007, which is after service. Crucially, the examiner also determined that there was no medical basis on which to support a

finding that the Veteran's lung condition was the result of environmental exposures in service.

* * *

Though there are VA treatment records pertaining to the Veteran's disability that note the Veteran's lung condition was of unknown etiology, this finding is consistent with the VA examiner's explanation that sarcoidosis is a chronic granulomatous disease of unknown origin that occurs across the general population, but as further explained by the VA examiner, there is not a medically sound basis routed [rooted?] in the medical literature that links the disease to Gulf War environmental hazards. Thus, there is affirmative evidence that the disability is not due to service in the Gulf War.

* * *

Consequently, the evidence does not show that the Veteran has a qualifying chronic disability (i.e., an undiagnosed illness, a medically unexplained chronic multi-symptom illness, or a diagnosed illness that VA determined warranted a presumption of service connection).

R. at 12.

The Court agrees with Mr. Chapman that this explanation is insufficient to satisfy the Board's duty to provide a statement of reasons or bases. The Board's reasoning is flawed in at least two respects. First, both the VA examiner and the Board seemed to focus on a lack of medical nexus, which is not a requirement under the presumption. *See Gutierrez*, 19 Vet.App. at 8. Second, it has now been firmly established that, with limited exceptions not applicable here, a lack of evidence may not be treated as substantive negative evidence. *Horn v. Shinseki*, 25 Vet.App. 231, 239 (2012); *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011). Thus, the absence of medical literature providing a link between sarcoidosis and Gulf War environmental hazards is not affirmative evidence that Mr. Chapman's lung condition was not incurred during military service. One reason for the establishment of the presumption in the first instance was the difficulty of proof in matters where extant medical knowledge has not caught up with the existence of unexplained maladies that may have connection to service in the Persian Gulf. *See Gutierrez*, 19 Vet.App. at 8.

Mr. Chapman argues for reversal and grant of service connection. The determination of whether sarcoidosis meets the criteria of paragraph (a)(2)(ii) in this case, however, is committed to the Board in the first instance. Therefore a remand is required. Nevertheless, for the guidance of the Board on remand, the Court will consider Mr. Chapman's arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted).

As a threshold matter, the Court notes that "signs or symptoms" involving the respiratory system may be manifestations of a "medically unexplained chronic multisymptom illness." 38 C.F.R. § 3.317(b)(8). The Board must determine whether Mr. Chapman's lung condition meets the criteria of 38 C.F.R. § 3.317(a)(1)(i). Because Mr. Chapman received no separation medical examination, and was asymptomatic until his condition was first discovered in 2007, it is unclear whether he can submit any further medical evidence to establish that his lung condition manifested during active service. *See also* R. at 43 (VA examiner stating that Mr. Chapman's chest x-ray could have become abnormal as late as early 2007).

The Court notes, however, that sarcoidosis may be rated as chronic bronchitis, which requires an Forced Expiratory Volume (FEV)-1 between 71 to 80 percent predicted for a disability rating of 10%. *See* 38 C.F.R. § 4.97, Diagnostic Code (DC) 6846, DC 6600 (2016). The Court further notes that the VA examiner recorded Mr. Chapman's FEV-1 as 72% predicted, and indicated that this test result most accurately reflected his level of disability. *See* R. at 42. The Board should explain whether the examiner's finding fulfills the requirement that Mr. Chapman's lung condition, which VA diagnosed as sarcoidosis, became manifest to a degree of 10% prior to December 31, 2016.

Assuming that the diagnosis of sarcoidosis is correct, and that the condition manifested to the required degree, the Board must next determine whether it is a "medically unexplained chronic multisymptom illness that is defined by a cluster of signs and symptoms." *See* 38 C.F.R. § 3.317(a)(2)(i)(B). The first requirement for a medical condition to fall under that description is that it be "without conclusive pathophysiology or etiology." 38 C.F.R. § 3.317(a)(2)(ii). The Court notes that both the medical definition of sarcoidosis and the evidence of record concerning Mr. Chapman's lung condition seem to uniformly indicate that the condition is of unknown etiology. *See* R. at 89 (interstitial lung disease of unknown etiology), 43 (sarcoidosis is a disease of unknown origin). There appears to be no evidence of record whether the condition may be conclusively explained by pathophysiology.

The regulation further requires that the condition be characterized by "overlapping symptoms and signs." 38 C.F.R. § 3.317(a)(2)(ii). The Board should explain whether the discussions of the multiple CT scans in the VA medical reports constitute "signs in the medical sense of objective evidence perceptible to an examining physician." 38 C.F.R. § 3.317(a)(3).

Finally, the regulation requires that the condition "[have] features *such as* fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii) (emphasis added). See 60 Fed. Reg. 6660 ("The commenter is correct in assuming that a single symptom or sign may be sufficient to establish entitlement under § 3.317."). In the course of the 2015 VA medical examination, Mr. Chapman reported that "he has become progressively more dyspneic with exertion over years (used to be a runner) and gets short of breath 'with a little wheezy cough' (which is transient) after walking at normal pace for 5-10 minutes." R. at 41. The Board should determine whether these external symptoms satisfy the "features" requirement of paragraph (a)(2)(ii).

In pursuing his claim on remand, Mr. Chapman will be free to submit additional argument and evidence as to the remanded matter, and the Board must consider any such evidence or argument submitted. See *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

II. CONCLUSION

On consideration of the foregoing, the Court SETS ASIDE the Board's June 22, 2015, decision and remands for further proceedings consistent with this decision.

DATED: November 29, 2016

Copies to:

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